



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 10, 2006

Mr. Jerry Bruce Cain  
Assistant City Attorney  
City of Laredo  
P.O. Box 579  
Laredo, Texas 787042-0579

OR2006-04848

Dear Mr. Cain:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 248585.

The City of Laredo (the "city") received two requests for information pertaining to a sexual harassment investigation of a named city employee, including copies of the original complaint, investigation, suspension letter, and specified phone records. You state that you have released the suspension letter and phone records. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, and 552.117 of the Government Code, as well as Rule 503 of the Texas Rules of Evidence and Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" may not be withheld from the public unless the information is excepted from disclosure under section 552.108 of the

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<sup>1</sup> Although you raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. See Gov't Code § 552.022.

Government Code or expressly confidential under other law. Gov't Code § 552.022(a)(1). The submitted information is a completed investigation made for the city, which is made expressly public by section 552.022(a)(1), unless it is expressly made confidential under other law or is excepted from disclosure under section 552.108. The city seeks to withhold the submitted information under sections 552.103, 552.107, and 552.111. We note, however, that these sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (attorney work product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 do not qualify as other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any portion of the submitted information under section 552.103, 552.107, or 552.111. However, sections 552.101 and 552.117 and Texas Rule of Evidence 503 are "other law" for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (Texas Rules of Evidence constitute "other law" for purposes of section 552.022 of the Government Code). However, as the Texas Disciplinary Rules of Professional Conduct are not considered "other law" for purposes of section 552.022, the city may not withhold the information under Rule 1.05. *See* Open Records Decision No. 676 at 3-4 (2002).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is encompassed by the common law right to privacy. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Information is protected from disclosure under the common law right to privacy if (1) it contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. *See id.* at 685.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

When there is an adequate summary of an investigation, the summary and any statements of the person under investigation must be released, but the identities of the victims and

witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of victims and witnesses must still be redacted from the statements.

The submitted information contains an adequate summary of the investigation into the alleged sexual harassment. Therefore, you must withhold the documents and audiotapes in the investigation file except for the summary and the taped statement of the individual under investigation which must be disclosed pursuant to *Ellen*, 840 S.W.2d at 525. However, the identities of the victim and witnesses to the alleged sexual harassment are protected by the common law privacy doctrine and must be withheld. *Id.* If the city is unable to redact the identities of the victim and witnesses in the audiotape of the individual under investigation, then the city must withhold this audiotape in its entirety.

Finally, section 552.117 may also be applicable to some of the information in the summary. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the requests for this information were made. If the employees at issue timely elected to keep their personal information confidential, the city must withhold the information we have marked under section 552.117. The city may not withhold this information under section 552.117 if these employees did not make timely elections to keep the information confidential.

In summary, under section 552.101 of the Government Code and the rationale set forth in *Ellen*, the city must release the summary of the sexual harassment investigation and the taped statement of the individual under investigation, redacting the identifying information, which we have marked, of the alleged victim and any witnesses. The city must withhold the remaining documents and audiotapes in the investigative file under section 552.101 and *Ellen*. If the employees at issue timely elected to keep their personal information confidential, the city must withhold the information we have marked in the summary under section 552.117. As our ruling is dispositive, we need not address your remaining arguments.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Tamara L. Harswick  
Assistant Attorney General  
Open Records Division

TLH/eb

Ref: ID# 248585

Enc. Submitted documents

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